

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**AUG 25 2006**

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CESAR ZAMORA-RESENDIZ,

Defendant-Appellant.

No. 06-50000

D.C. No. CR-05-01337  
(RTB)

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
Roger T. Benitez, District Judge, Presiding

Argued and Submitted July 28, 2006  
Pasadena, California

Before: JOHN R. GIBSON\*\*, RYMER, and CLIFTON, Circuit Judges.

Cesar Zamora-Resendiz appeals his sentence of 12 months' imprisonment, imposed after he pled guilty to the transportation of illegal aliens and aiding and

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\*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\*The Honorable John R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

abetting in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii) and (v)(II). He argues that he received inadequate notice that the court intended to impose a sentence above the advisory guideline sentencing range on the grounds of under-representation of his criminal history. See U.S.S.G. § 4A1.3(a) (2004).

In Burns v. United States, 501 U.S. 129, 138-39 (1991), the Supreme Court held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government," the court must "give the parties reasonable notice that it is contemplating such a ruling," and "[t]his notice must specifically identify the ground on which the district court is contemplating an upward departure." See also Fed. R. Crim. P. 32(h) (codifying the holding of Burns). A panel of this court has recently held that Burns notice is required post-Booker, just as it was pre-Booker. United States v. Evans-Martinez, 448 F.3d 1163, 1167 (9th Cir. 2006).

On appeal, the government concedes that the district court did not specifically notify Zamora-Resendiz that it was considering a sentence outside the advisory guidelines range. Moreover, the presentence report failed to provide the required notice. See United States v. Ramirez-Jiminez, 967 F.2d 1321, 1328 (9th Cir. 1992). Accordingly, we vacate the sentence and remand for resentencing in accordance with Evans-Martinez.

REVERSED AND REMANDED.